81-127

No.

Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GLENN G. GETZ, PETITIONER

V.

UNITED STATES OF AMERICA
and
C. HOWARD FARR, SPECIAL AGENT, I.R.S.

RESPONDENTS.

Petition for a writ of Certiorari to
The United States Court of Appeals for
The Fifth Circuit

GLENN G. GETZ, Petitioner
Attorney for Himself

Route 1, Box 608
Gordon, Georgia 31031

Phone: 912/ 986-6275

QUESTION PRESENTED

1. Is there a "Law of the Circuit" on mootness of an appeal in I.R.S. Bank Summons Enforcement Cases in the Fifth Circuit?

2. If there is no recognized or admitted "Law of the Circuit" on mootness, did the Peitioner actually enjoy due process of law (as enforced in other Circuits), when his Appeal was dismiss without Opinion for mootness?

3. Does total and indefinite suspension of any I.R.S. assessment, levy or collection activity constitute "abandoment of any valid civil purpose" as forbidden by this Court in U.S. v. LaSalle National Bank, 437 U.S. 298, during the pendency of an administrative agency criminal investigation?

4. Does the possession of all material probative elements necessary for criminal tax prosecution, coupled with a final

administrative determination of the "potential impact and/or deterrent effect a successful prosecution case will generate", constitute an "institutional commitment" to "recommend" and "refer" for prosecution and indicate sufficient cause to suspect bad faith on the part of the I.R.S., when their Administrative Summons issued after the fact?

INDEX

QUESTION PRESENTED i

Index iii

Table of Authorities Cited iv

PETITION 1

CITATIONS TO OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

A. Nature of the Case-Disposition below

B. Statement of Facts

REASONS FOR GRANTING THE WRIT

CONCLUSION

Appendix 19

Certificate of Service following

TABLE OF AUTHORITIES CITED

UNITED STATES CONSTITUTION:

Fifth Amendment

CASE AUTHORITIES:

Baldridge v. U.S., 406 F2d 536, (CA5 1969)

Barney v. I.R.S., 618 F2d 1268

FTC v. Gibson Products Corp., 569 F2d 900, (CA5 1978)

Muncaster v. C.I.R., T.C.Memo 1976-17, 35 T.C.M. 61, P.H. Memo T.C. §76017.

U.S. v. Carpenter, 425 F2d 264, (CA5 1970)

U.S. v. LaSalle National Bank, 437 U.S. 298

U.S. v. Porth, 426 F2d 419, (CA10 1970)

UNITED STATES CODE:

26 U.S.C. 6020(b), 6201, 6203, 6211 & 6212

26 U.S.C. 7203

26 U.S.C. 7402(b)

26 U.S.C. 7604(a), 7609

26 U.S.C. 7801

26 U.S.C. 7214

UNITED STATES CODE: continued

28 U.S.C. 1254(1)

INTERNAL REVENUE SERVICE DOCUMENTS:

I.R. Manual Supplement 9G-93

Form 1040 Individual Income Tax Return

Form 1099 Information Item

Form 3949

T.C. 914 Control Notice

In The

SUPREME COURT OF THE UNITED STATES

October Term 1980

No.

GLENN G. GETZ, PETITIONER,

v.

UNITED STATES OF AMERICA

and

C. HOWARD FARR, SPECIAL AGENT, I.R.S.

RESPONDENTS.

On Petition For A Writ of Certiorari To The United States Court of Appeals For Fifth Circuit

---

Petitioner requests that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this Case No. 80-7048.

CITATION TO OPINIONS BELOW

(Not Reported)

1. The Judgment of the Court of Appeals is set forth in Appendix "A" to this Petition (App. p-1, 2).

2. The Order of the Court of Appeals denying rehearing is set forth in Appendix "B" (App. p-3, 4).

3. The Order of the Court of Appeals carrying the "mootness" issue with the main Case is set forth in Appendix "C" (App. p-5, 6).

4. The Order and Judgment of the District Court enforcing the I.R.S. Summons is set forth in Appendix "D" (App. p-7, 8, 9, 10).

JURISDICTION

1. The Court of Appeals entered judgment on March 5, 1981 (Appendix "A", p-1).

2. The Court of Appeals denied rehearing on April 27, 1981 (Appendix "B", p-3).

3. The jursidiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Petitioner intervened as a matter of Statutory right(26 U.S.C. 7609) in a Bank Summons Enforcement proceeding in U.S. District Court brought pursuant to 26 U.S.C. 7402(b) and 7604(2).

The Fifth Amendment to the U. S. Constitution provides in pertinent part:

> . . . No person shall . . . be deprived of life, liberty or property without due process of law.

The Respondents had a duty to assess, levy or collect any valid civil liability according to 26 U.S.C. 7801, 6020(b), 6201, 6203, 6211 and 7214 which they failed and refused to do in favor of seeking criminal discovery by use of the Administrative Summon (26 U.S.C. 7602).

STATEMENT OF THE CASE

A.
NATURE OF THE CASE AND DISPOSITION BELOW

1. Petitioner Glenn G. Getz, was granted respondent/intervenor status by the

U. S. District Court for Macon, Georgia, in the I.R.S. Administrative Bank Summons Enforcement Case, originally styled:

> United States of America and C. Howard Farr, Special Agent, Internal Revenue Service,
>
> versus
>
> Citizens and Southern Bank of Milledgeville and its President, Jerry M. Mc Cree.

The District Court Judge, first, issued an Order granting Getz' "Request for Admissions" from the Petitioners, and, later, vacated his Order at the eleventh hour.

The District Judge quashed all Subpoenas issued on Getz' behalf, and, then, proceeded with a consolidated Hearing over Getz' objection. The "companion" Case was also a Bank Summons Enforcement Case wherein the Respondent-Intervenors, named Jim and Paulette Perkins, were represented by one Scott McClarty as Counsel.

After Getz renewed objection to the Court's failure and refusal to grant limited discovery and proof by either documents or

testimony, Getz adopted the arguments of counsel McClarty as his own - including I.R.M. Supplement 9G-93 and the full spectrum of the facts in an Offer of Proof made in open court as to what the testimony of the subpoened Witnesses would reveal.

2. The U. S. District Court for the Middle District of Georgia (Macon) ordered the Summons enforced (Appendix "D", p-7, 8, 9, 10). Notice of Appeal was filed.

3. A stay was denied by the District Court, and the Court of Appeals denied Mandamus to the District Court Judge to grant a stay pending appeal.

4. While the Case was on appeal, the Government moved to dismiss for mootness. The Court ordered the Motion to be carried with the Case (Appendix "C", p-5, 6).

> The Court requests supplemental briefs on the issues involved and whether or not there is presently a "Law of the Circuit" on mootness of an appeal in such cases.

5. In due time all Briefs were filed and the Case was orally argued in the Court

on its merits. No inquiry was made of either Party by the three Judges on the issue of mootness. Mr. Getz argued:

> I would like to touch briefly on the question of mootness. . . . Congress passed a law giving me the right to intervene in this Case and the right to have an appeal. I don't believe it was their intent to have that taken from me because of the action of a Third Party over whom I have absolutely no control. (See Appendix "E", p-11, at 13, Line 23)

6. The U. S. Court of Appeals for the Fifth Circuit dismissed the appeal for mootness on March 5, 1981, and remanded to the District Court with instructions to vacate the Enforcement Order (Appendix "A", p-1).

7. The U. S. Court of Appeals for the Fifth Circuit denied the Petition for Rehearing on April 27, 1981 (Appendix "B", p-3).

STATEMENT OF THE CASE

B.
STATEMENT OF THE FACTS

Internal Revenue Manual Supplement 9G-93 was laid before the U. S. District Court in its entirety as a factual Exhibit both as

to I.R.S. institutional policies and their action in the Bank intervention Cases. The Manual Supplement, coupled with Getz' Answer and Counterclaim and preTrial Demand for Admissions, taken along with the courtroom Offer of Proof, established, conclusively, as a matter of fact, that prior to the issuance of the Bank Summons in question, the I.R.S. Regional Service Center:

1. Had proof of gross income of $33,393.58, reported on an I.R.S. 1099 Form in their possession.

2. Had evidence that Getz filed an I.R.S. 1040 Form (Tax Return) containing no information from which a tax liability could be computed and claiming Constitutional Fifth Amendment protections - i.e. evidence no Return was filed - according to U. S. v. Porth, 426 F2d 419 (CA10 1970)):

> A taxpayer's return which does not contain any information relating to the taxpayer's income from which a tax can be computed is not a Return within the meaning of the Internal

Revenue Code or the Regulations adopted by the Commissioner.

3. Had the so called "Illegal Tax Protest" Return as evidence of "willful" failure to file an income tax return in violation of 26 U.S.C. 7203.

The I.R.S. Regional Chief C.I. B. made a final administrative determination that Getz was an "illegal tax protestor" and referred the File to the District Chief Criminal Investigation Division via I.R.S. Form 3949 to build a criminal case.

The District Chief, C.I.D., after "independent evaluation" confirmed Getz' "Illegal Tax Protestor" status; then, examined each of the three probative criminal prosecution elements and made a final administrative determination respecting the "potential impact or deterrent effect a successful prosecution [of Getz] would generate".

The District Chief, C.I.D. then

ordered indefinite suspension of any and all civil assessment, levy or tax collection activity by means of an I.R.S. "T.C. 914" control. These actions constitute an institutional determination to prosecute.

Each and every action named above was taken before the Special Agent was ever assigned to the Case and before the Administrative Summmons to investigate "Tax Liability" was issued on July 12, 1979. Criminal prosecution was (formally) "recommended" on or after August 25, 1980.

The Audit Division made no Return, assessed and levied no tax, laid no deficiency.

The Petitioner Getz has continuously contested delivery of the Bank Records to the I.R.S. at every stage of the proceeding as being in bad faith and for improper purposes.

REASONS FOR GRANTING THE WRIT

1. Law of the Circuit on Mootness:

Petitioner shows the Court that by its own tacit admission the Fifth Circuit Court of Appeals agrees that there is no "Law of the Circuit" on mootness in Bank Summons Enforcement Cases. (See Appendix "C", p-3)

The Issue was duly briefed by Petitioner Getz on order of the Court of Appeals as the Record will show. Petitioner argues here, that the Court's failure and refusal to answer by definitive Opinion the question which they, themselves, raised, constitutes sufficient authority for this Court to assert its supervisory powers - laying down the Law for the Fifth Circuit and all others. The Court may Judicially Notice the burdensome jamming of court machinery necessitated by requests for stays, contentions of mootness, and blurring of meritorious issues arising out of this aspect of Bank Summons Cases. The Court must fill

the vacuum of Case Authority on the subject of mootness in Bank Summons Enforcment Cases. The importance of these Cases is underscored by the Congressional Docket Precedence Mandate of 26 U.S.C. 7609(h)(2).

2. Due Process on Mootness:

Because there is no Case Law on mootness in the Fifth Circuit in point with the facts and circumstances as shown in Getz' Case, the Petitioner was actually deprived of due process by the Appeals Court. The Record will show that Getz' Supplementary Brief on mootness, submitted to the Appeals Court, clearly distinguished him from the facts in certain cited Fifth Circuit Cases,to wit:

Baldridge v. U.S., 406 F2d 526 (1970)

U.S. v. Carpenter, 425 F2d 264 (1970)

Getz showed that his was a live controversy as was the controversy typified by the case of FTC v. Gibson Products, 569 F2d 900 (CA5 1978).

Getz also distinguished his Case from that of Barney v. I.R.S, 618 F2d 1268

where no factual showing was made by the Intervenor to oppose enforcement.

Petitioner argued that the "Law of the Circuit" must be that a "third party record keeper" bank can moot its own case by delivery of records, but it cannot moot the case as to the respondent-intervenor, if the intervenor continually opposes delivery and does not moot the case himself by cooperation.

In view of the Government's failure to bear the burden of proof imposed by its own Motion to Dismiss (that the facts of Getz were in point with their cited Cases), Petitioner asserts it was error for the Appeals Court to dismiss for mootness, and the error was compunded by their so doing without any definitive Opinion on the subject.

3. Abandonment of any Valid Civil Purpose:

The case of U.S. v. LaSalle National Bank, supra, decided by this Court holds:

> . . . those opposing enforcement

> of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service..

The evidence in Getz' Case showed gross income of $33,393,58 for Getz and no (acceptable) 1040 Income Tax Return for the Year in question. See U.S. v. Porth, supra.

The I.R.S. failed in their sworn duty (26 U.S.C. 7801, 7214) to:

1. Prepare a Return pursuant to 26 U.S.C. 6020(b).

2. Assess any tax based on gross income and one standard deduction pursuant to 26 U.S.C. 6201, 6203; or

3. Lay any deficiency pursuant to 26 U.S.C. 6211, 6212 et seq.[1/]

The Respondent I.R.S. not only abandoned these available and mandatory avenues

---

1/ See Muncaster v. C.I.R., T.C. Memo 1976-17, 35 TCM 61, P-H Mem T.C. §76017:

> In Raymond M. Hartman . . . we pointed out that Section 6211(2) does not required that a return be made either by taxpayer or the Commissioner before a deficiency . . . may be properly determined by the Commissioner.

(26 U.S.C. 7801, 7214) of civil tax determination but they actually slammed the doors on any kind of civil assessment, levy or collection activity (even as to fraud penalties) by the TC 914 Control Notice (ordered by the District Chief, C.I.D.) which froze all civil action from that day to this.

The Respondents abandoned any valid civil collection purpose prior to the Summon's issuance in direct disobedience to the mandate of this Court in U.S. v. LaSalle National Bank, supra.

4. Institutional Commitment to Prosecute:

After the I.R.S. had in its undisputed possession:

1. Evidence of all three probative elements for prosecution under 26 U. S. C. 7203; and,

2. Evidence of substantial tax liability, and the Laws to assert it (26 U.S.C. 6020(b), 6201, 6203, 6211, and 6212); and,

3. A final administrative deter-

that a successful criminal prosecution would have a significant "impact and/or deterrent effect" on taxpayer "Voluntary Compliance"; and,

After they branded Getz as an "illegal tax protestor" there was actually existant in the "institutional" sense a decision to prosecute Getz BEFORE the Summons issued.

Because these final administrative determinations were made before the Special Agent was ever assigned to the Case and before the Bank Summons ever issued (on July 12, 1979), and taking Judicial Notice that the actual recommendation for prosecution to the Justice Department was delayed until or after August 25, 1980, a major question before the Court is this:

> Was there a sufficient showing before the District Court to merit limited discovery going to prove the counter charge Getz made?
>
> . . . that Petitioner (I.R.S.)was

deliberately delaying the making of his criminal prosecution and seeking criminal discovery through use of the Civil Summons after an institutional commitment to prosecute was existant.

CONCLUSION

The significant impact of the mootness issue in Bank Summons Enforcement Cases can be well appreciated by this Court, especially in view of the Congressional Mandate for docket expediency. Not only is there a crying need to unclog the Courts on these Bank Summons Cases as to mootness, but the need is critical, also, for an expression by this Court to the end that all Circuits will carry out the Law uniformly.

Secondly, the novel issues raised by Petitioner directly going to interpretation of "Institutional Posture" and this Court's controlling case U. S. v. LaSalle, supra, are ripe for ajudication - especially since final disposition at this time will forestall endless and varying determinations on the

identical issues bound to be raised in every Circuit in the Land, unless this Court promptly lays down the Law.

PRAYER

WHEREFORE, The Court is due to grant the Petition here for issuance of the writ of Certiorari.

Respectfully submitted,

Glenn G. Getz, Petitioner
Attorney for Himself

May 21, 1981

Route 1, Box 608
Gordon, Georgia, 31031

Phone: 912/ 986-6275

APPENDIX

Exhibit	Description	Page
"A"	JUDGMENT of the U. S. Court of Appeals, Fifth Circuit, dismissing for "mootness".	1
"B"	ORDER of the U. S. Court of Appeals, Fifth Circuit, denying Rehearing.	3
"C"	ORDER of the U. S. Court of Appeals, Fifth Circuit, requesting Supplementary Briefs on "Mootness".	5
"D"	ORDER of the U. S. District Court, Middle District of Georgia, Macon Division, ordering enforcement of I.R.S. Summons (December 20, 1979) & JUDGMENT dismissing Getz' Counter Claim (January 7, 1980).	7
"E"	EXCERPTS from the Transcript of Oral Argument before the U. S. Court of Appeals, Fifth Circuit.	11

APPENDIX "A"

U. S. COURT OF APPEALS
F I L E D
MAR 5 1981
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

DO NOT PUBLISH

No. 80-7048

UNITED STATES OF AMERICA and
C. HOWARD FARR, Special Agent,
Internal Revenue Service,

Plaintiffs-Appellees,

CITIZENS AND SOUTHERN BANK OF
MILLEDGEVILLE, Etc., ET AL.,

Defendants,

GLENN G. GETZ,

Intervenor-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

APPENDIX "A" - continued

Before FAY, KRAVITCH, and HATCHETT, Circuit Judges.

PER CURIAM:

Because this appeal is moot, it is DISMISSED, and remanded to the district court with instructions to vacate the enforcement order.

APPENDIX "B"

U.S. COURT OF APPEALS
F I L E D
APR 2 1981
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7048

UNITED STATES OF AMERICA and C. HOWARD FARR, Special Agent Internal Revenue Service,

Plaintiffs-Appellees,

versus

CITIZENS AND SOUTHERN BANK OF MIILEDGEVILLE, Etc., ET AL.,

Defendants,

GLEEN G. GETZ,

Intervenor-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

---

APPENDIX "B" - continued

ON PETITION FOR REHEARING

(April 27, 1981)

Before FAY, KRAVITCH, and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

s/ Joseph W. Hatchett
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

APPENDIX "C"

U.S COURT OF APPEALS
F I L E D
APR 24 1980
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-7048

UNITED STATES OF AMERICA and C. HOWARD FARR, Special Agent Internal Revenue Service,

Plaintiffs-Appellees,

versus

CITIZENS AND SOUTHERN BANK OF MILLEDGEVILLE, Etc., ET AL.,

Defendants,

GLENN G. GETZ,

Intervenor-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

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APPENDIX "C" - continued

Before GEE, RUBIN AND POLITZ, Circuit Judges.
BY THE COURT:

IT IS ORDERED that the motion of appellees to dismiss the appeal is carried with the case. The court requests supplemental briefs on the issues involved and on whether or not there is presently a "law of the circuit" on mootness of an appeal in such cases. Compare United States v. Carpenter, 425 F.2d 264 (5th Cir. 1970), and Baldridge v. United States, 406 F.2d 526 (5th Cir.1978) with FTC v. Gibson Products of San Antonio, Inc., 569 F.2d 900 (5th Cir. 1978). See also Barney v. United States, 568 F.2d 116 (8th Cir. 1978).

APPENDIX "D" - U. S. District Court

O R D E R

The questions raised here today are not new and are not novel. The Supreme Court has answered every one of them in the Donaldson and in the La Salle case. This Court is not vested with responsibility for doing anything other than determining whether or not these summons shall be enforced. That is the only question that is before the Court. This Court is not here to compel IRS to assess anybody for raxes at a particular time. Congress put that responsibility on them and this Court doesn't even have jurisdiction of it. Mr. and Mrs. Perkins couldn't come to the courthouse and say we owe $100,000 in taxes and want to pay it and IRS refuses to accept it. We just have nothing to do with that.

The Court has very carefully studied all of the items that you all have alluded to,

has very carefully read the Donaldson and the LaSalle cases, given consideration to the possible applicability of the Bank Records Act which Congress has now passed and has determined that act specifically has an exemption in it as to summons issued under the IRS procedure and therefore it does not apply. So it's not before the Court.

The Court finds as a matter of fact that IRS has proceeded on a criminal and civil in tandem investigation which yet remains incomplete. The Court finds as a matter of fact and as a matter of law that each and every one of the summons that are the subject matter of these two hearings is within the Internal Revenue Section, 26 USC 7602 I believe it is, which Congress passed permitting such summons to be issued. That is the extent of this Court's authority.

That being the Court's determination,

APPENDIX "D" - U. S. District Court Order

the Court orders that the summons will be enforced.

The Central Bank has prayed by motion that it not be required to respond until January 15th or thereafter. To give the taxpayers in this case an opportunity to contest this Court's ruling and to give the bank a fair opportunity to respond, the Court is going to order that each of these summons be enforced at whatever date the IRS selects after January 15th, 1980. They will not be enforced prior to that time. That will give you ample opportunity to seek a stay of the Court's order if you wish to.

SO ORDERED this 20th day of December, 1979.

s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

APPENDIX "D" - continued

JUDGMENT

Pursuant to the Order of this Court which was dated and filed December 20, 1979, and for the reasons stated therein, each Internal Revenue Service Summons in the afore stated cases is enforced at whatever date the Internal Revenue Service selects after January 15, 1980. They will not be enforced prior to that time.

AND pursuant to the Order of this Court which was dated January 3, 1980 and filed January 4, 1980, and for the reasons stated therein, Intervenor's counterclaim in Civil Action No. 79-271-Mac is hereby dismissed.

This 7th day of January, 1980.

GIRARD W. HAWKINS, Clerk

s/ Helen F. Newberry

By: Helen F. Newberry
Deputy Clerk

APPENDIX "E"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, and C. HOWARD FARR, Special Agent, Internal Revenue Service,	)	
Appellee,	)	
vs.	)	Case No. 80-7048
CITIZENS & SOUTHERN BANK OF MILLEDGEVILLE, and, its President, JERRY M. McRee, and GLENN G. GETZ,	)	
Appellant and Intervenor.	)	

- - -

Proceedings before the United States Court of Appeals for the Fifth Circuit, at 56 Forsythe Street, Atlanta, Georgia, stenographically recorded by Loren P Hintz, Certified Court Reporter and Notary Public, on Thursday, February 5, 1981, commencing at approximately 11:10 a.m.

APPENDIX "E" - continued

(page 14)

[1] involved in this particular Hearing. I do not recall [2] any information about that. There was no Revenue [3] Agent, to my knowledge, involved in this case. And [4] he mentioned that this case was handled very rapidly. I agree with that.

[6] But, I am saying that the recommendation for prosecution was delayed, but that was not the case.

[9] Another thing I would like to mention [10] to the Court here is, why did the IRS and the Court wait until 5:00 o'clock on December 18th to inform [12] me and let me know they had put a Brief into the [13] Court, asking them to not give the Discovery I [14] requested at the very last moment? [15] Now, I requested Discovery on [16] December 3rd. Why didn't they do this on the 4th, [17] 5th, or 6th instead of the 18th? This is one of the [18] greatest errors that, I say, the lower Court made.

APPENDIX "E" - continued

They absolutely denied me a right to come into the courtroom to prove my claims. I can't prove anything standing here talking. I have to have someone who can show proof.

I would like to touch briefly on the question of mootness, also, your Honor. I am not going to cite a bunch of cases. I am not a lawyer, but Congress passed a law giving me the right to intervene in this case and the right to have an appeal.

I don't believe it was their intent to have that taken from me because of the action of a third party of whom I have absolutely no control.

I can't put a gun to their head and say, "Don't do it".

Of the cases that have been cited in here, in one case the gentleman did not even try to stop the banks from giving up the records. He gave in. He was not

a party to the whole case.

I have done everything legally that I knew how to do to stop the surrender of these records. [18] And I say, the case should not be moot.

If this Court so decides to make this moot, would you not have to, effectively, make every [18] Summons enforcement case made moot and the right to [19] have an appeal and to disagree?

I ask you to consider that, and ask you to reverse the lower Court's decision and have [22] the records returned and deny the right of use of [23] them.

THE COURT: Thank you, Mr. Getz. The Court is in recess under the usual Order.

AFFIDAVIT OF SERVICE

(Certificate of Service)

I certify that this date I have caused to be served 3 copies of this PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS upon the Solicitor General of the United States at:

Department of Justice
Washington, D. C. 20530

and 1 copy of the same upon the U. S. Attorney for the Middle District of Georgia, Macon Division at:

U. S. Courthouse Building
Macon, Georgia

both by U. S. Postal Service, postage prepaid, from Montgomery, Alabama.

_____
Robert Muncaster

Subscribed and affirmed to
before me this ___day of
July 1981.

_____
Notary Public, State at Large

My commission expires on _____

Office-Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-127

In the Supreme Court of the United States

OCTOBER TERM, 1980

GLENN G. GETZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-127

GLENN G. GETZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the decision below dismissing his appeal from a district court order enforcing a third-party Internal Revenue summons directed against his bank. Because the bank has fully complied with the summons by producing financial records relevant to the income tax liability of petitioner and his wife, the case is moot. Accordingly, the petition should be denied.

The pertinent facts may be summarized as follows: Pursuant to Section 7609 of the Internal Revenue Code of 1954 (26 U.S.C.), petitioner intervened in this summons enforcement proceeding brought by the government and an agent of the Internal Revenue Service in the United States District Court for the Middle District of Georgia against the Citizens and Southern Bank of Milledgeville and the bank's president, seeking the production of financial records relevant to petitioner's federal income tax liability for 1978. After the district court filed its enforcement order (Pet.

App. 7-9), and entered judgment (Pet. App. 10), the bank fully complied with the summons.

The court of appeals dismissed petitioner's appeal as moot (Pet. App. 1-2). It therefore refused to consider his argument that the district court had erred in denying his request for discovery and in quashing the subpoenas duces tecum he had served upon various officials of the Internal Revenue Service.

The only relief sought by the government in this case was enforcement of the summons. Since this relief was obtained when the bank complied with the summons, there is no longer a case or controversy and the court of appeals properly dismissed the case as moot. *United States* v. *Equity Farmers Elevator*, 48 A.F.T.R. 2d 81-5648 (8th Cir. July 1, 1981); *United States* v. *First American Bank*, 649 F. 2d 288 (5th Cir. 1981);[1] *United States* v. *Silva & Silva Accountancy Corp.*, 641 F. 2d 710 (9th Cir. 1981); *United States* v. *Aquinas College Credit Union*, 635 F. 2d 887 (6th Cir. 1980), cert. denied, No. 80-1460 (Apr. 6, 1981); *United States* v. *Arthur Andersen & Co.*, 623 F. 2d 720 (1st Cir. 1980); *United States* v. *Deak-Perera International Banking Corp.*, 610 F. 2d 89 (2d Cir. 1979); *Barney* v. *United States*, 568 F. 2d 116 (8th Cir. 1978); *Kurshan* v. *Riley*, 484 F. 2d 952 (4th Cir. 1973); *Vesco* v. *SEC*, 462 F. 2d 1350 (3d Cir. 1972) (analogous S.E.C. subpoena case).[2]

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[1]Petitioner errs in his assertion (Pet. 10-12) that there is "no Case Law" on mootness in the Fifth Circuit. In *United States* v. *First American Bank*, the court, relying on "the established law of this circuit" (649 F. 2d at 289), held that compliance by a third-party recordkeeper with an order enforcing an Internal Revenue summons moots any appeal from that enforcement order.

[2]In *United States* v. *Friedman*, 532 F. 2d 928, 931 (3d Cir. 1976) the court held that a summons enforcement appeal was not moot, despite the summoned party's compliance, because the validity of the summons could arise upon a later motion to suppress the summoned records at a subsequent civil or criminal tax proceeding. Although we believe that

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1981

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the proper remedy there would have been for the court of appeals to remand the case to the district court to vacate the enforcement order so mooted by compliance (as the court below did), *Friedman* is, at all events, distinguishable on its facts because "there ha[d] been incomplete compliance with the court's order since the IRS ha[d] not yet taken [a particular witness'] testimony" (*ibid.*).

Office - Supreme Court, U.S.
FILED
SEP 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-127

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GLENN G. GETZ, PETITIONER

V.

UNITED STATES OF AMERICA
and
C. HOWARD FARR, SPECIAL AGENT, I.R.S.

RESPONDENTS

Petition for a writ of Certiorari to
The United States Court of Appeals for
The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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INDEX

Table of Authorities cited		ii
ARGUMENT IN REPLY		1
Certificate of Service		9
APPENDIX:		
Exhibit	Description	
"F"	Government's MOTION TO DISMISS APPEAL for mootness	10
"G"	Appellant Getz Court-Ordered* SUPPLEMENTARY BRIEF on mootness	14
"H"	Supreme Court Order denying Stay	35
"J"	Notice of Criminal Prosecution:	36, 38

---

* For ORDER, see APPENDIX "C" of PETITION.

TABLE OF AUTHORITIES CITED

Baldridge v. U.S.,
406 F2d 536 (CA5 1969) 2, 3, 4

Barney v. I.R.S.
618 F2d 1268 1, 3

Deak-Perera International Banking Corp.
610 F2d 89 (CA2 1979) 1

FTC v. Gibson Products Corp.
569 F2d 900 (CA5 1978) 3, 5

Grathwohl v. U.S.
401 F2d 166 (CA5 1968) 2

Lawhon v. U.S.
390 F2d 663 (CA5 1968) 2

U.S. v. Carpenter
425 F2d 264 (CA5 1970) 2, 3, 4, 5

U.S. v. First American Bank
504 FSupp 90 (D.C.No.Dist.Fl 1980) 2

U.S. v. First American Bank
649 F2d 288 (CA5 1981) 2, 3

The MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION candidly admits that the Court of Appeals refused to consider the Appellant's Case on its merits; or, to remedy or even consider the error of the District Judge, Wilbur Owens, who Ordered enforcement of the IRS Summons in the first place.

The Respondents assert "mootness" as the only issue, when in fact never has the Government nor the Courts shown by fact or law that Appellant Getz' Case is not entirely distinguished from every single Case cited against him. In addition to numerous other Cases named in the Court below, the Case of Getz is distinguished from Barney who made no factual showing, and from Deak-Perera, where the Intervenor didn't even show up in Court at the Intervention Hearing, much less submit any evidence.

The Solicitor General errs in his assertion, to wit: (Footnote 1)

> Petitioner errs in his assertion (Pet.10-12) that there is "no Case Law"

> on mootness in the Fifth Circuit. In United States v. First American Bank, the court, relying on "the established law of this circuit" (649 F2d at 289), held that compliance by a third-party recordkeeper with an order enforcing an Internal Revenue summons moots any appeal from that enforcement order.

The Solicitor General well knows that U. S. v. First American Bank was decided on June 29, 1981, more than 3 1/2 months after The Getz Case was decided on March 5, 1981. Furthermore, First American Bank, 649 F2d 288, grows out of First American Bank, 504 FSupp 90 (D.C.No.Dis.Fl.July 14, 1980), wherein it was shown that Intervenor offered no evidence[1/] in contrast to Getz, who made every possible attempt to launch a factual showing.

If there were any "established law of the circuit" decided by Carpenter (1970), Baldridge (1969), Grathwol (1968) and Lawhon

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1/ "(T)axpayers, who had shown nothing in support of their conclusionary charges, had shown nothing warranting further discovery." U.S. v. First American Bank, 504 FSupp at 90.

(1968), how could Judges Gee, Rubin and Politz be so pitifully ignorant of its existence on April 24, 1980, when they ordered (App."C") Supplementary Briefs on the question of "whether or not there is presently a 'law of the circuit' on mootness ? Compare U. S. v. Carpenter, Baldridge, (cites omitted) with FTC v. Gibson Products of San Antonio. See also Barney v. U. S."(cites omitted).

Apparently this "established" law of the circuit was not discovered by Judges Godbold, Hatchett and Kravitch on June 29, 1981, in the First American Bank Case until 3 1/2 months after two of the same Judges (Hatchett and Kravitch) failed and refused to acknowledge the existence of any such "established law" in the Getz Case on March 5, 1981, in their Decision.

This Court must take Judicial Notice that the Appeals Court responded to the Government's original MOTION TO DISMISS FOR

MOOTNESS (App."F") with an ORDER (App."C") that the mootness issue would be carried with the case.

Sometime later, Appellant Getz' SUPPLEMENTARY BRIEF ON MOOTNESS (App."G") was filed, distinguishing every Court cited Case.

The Government and the Appeals Court failed and refused to meet the mootness issue either by Argument or Opinion. The Court failed and refused to acknowledge that the case of Getz was distinguished by fact and law from every cited Case used against him.

Baldridge and Carpenter were both decided before Congress recognized the taxpayer's right of intervention by Statute, effective February 28, 1977.

In Baldridge, the Taxpayer's records were delivered over without Record objection by the Taxpayer, hence, the appeal in Baldridge was moot.

Getz timely raised factual objections,

by Affidavit, demand for admissions and offer of proof in opposition to Summons enforcement. He forbid the the Bank - third party recordkeepers - to deliver. They did so over Getz' objection. It was not Getz who mooted this Case, if it were mooted.

In Carpenter, the Taxpayers did not enjoy legal standing to intervene and, hence had no legal "right" of appeal on the merits of the enforcement Order. Getz did have a "right" of intervention and also a "right" of appeal. He got cheated out of both by a sham and subterfuge.

Carpenter delivered over his own Records and mooted his own Case. Getz did not.

FTC v. Gibson Products would show that judicial enforcement of an administrative order does not overthrow the power of the Appeals Courts to remedy an evil done by the lower Courts. The Fifth Circuit Court has the power to correct the District Court's

erroneous enforcement order, but they fail in their duty, pretending "mootness" closed the Case. How "moot" is it when the actions of the District Judge abusing his power, and acting as a partisan advocate of the IRS enforced the Summons and then "mooted" this Case by his own arbitrary power, when he refused to grant a stay on appeal.

The U. S. Supreme Court refused to grant an APPLICATION FOR STAY PENDING APPEAL, Case No. A-151, August 23, 1979 (App."H") supposing, of course, that no stay was necessary to protect Mr. Getz' right of appeal on the merits. The folly of that refusal to grant a stay is now obvious. The lower Courts have found the means to destroy the mandate of Congress granting both intervention rights and right of appeal. By destroying Getz' right of appeal by pretensions of mootness, they have also destroyed his right of appeal.

The issue is clear: "Mootness" is a

contrived means to destroy the Citizen's right to his day in court on appeal. This Court would do well to issue the writ of certiorari and hear the cause. Government injustice, corruption and insensitivity to the Citizen's honest Petitions breed a dangerous cynicism and disrespect for even righteous authority. The Government is a teacher, for good or evil. They cannot escape the consequences of teaching evil by denying justice.

May God have mercy on the souls of Judges who always seem to take the side of the rich, the powerful, the mighty - the "Law Enforcement Authorities". The Courts and the IRS seem to constantly turn a deaf ear to the honest common people to cheat them out of the precious little "rights" which still, supposedly, belong to them.

Getz' Case is not "moot". The Government's position, by fact and law, is a sham and a fraud.

If the Summons Enforcement Case is really "moot", then why haven't Respondent's proceeded to Criminal Trial, which was their sole purpose from the outset? (App."J") Do they fear the bad faith Enforcement Issue will crop up again in Court unless this Court destroys the issue by pretended "mootness" in an attempt to bury Judge Owens' blatant bias, abuse and error as "res judicata"? Justice must be done, here and now. This Court has a duty to order the Getz' Appeal be remanded for disposition <u>on its merits</u>. Petitioner so moves.

Glenn G. Getz
Petitioner for Himself

25 September 1981

AFFIDAVIT OF SERVICE
(Certificate of Service)

I certify that this date I have caused to be served 3 copies of this REPLY BRIEF upon the Solicitor General of the United States at:

Department of Justice
Washington, D. C. 20530

and 1 copy of the same upon the U. S. Attorney for the Middle District of Georgia, Macon Division at:

U. S. Courthouse Building
Macon, Georgia

both by U. S. Postal Service, postage prepaid, from Montgomery, Alabama.

_____
Robert Muncaster

Subscribed and affirmed to
before me this ___ day of
September, 1981.

_____
Notary Public, State at Large

My commission expires on _____

APPENDIX "F"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA and C. HOWARD FARR, Special Agent, Internal Revenue Service, Petitioners-Appellees, v. CITIZENS & SOUTHERN BANK OF MILLEDGEVILLE, and its President, JERRY M. McREE, Respondents, and GLENN G. GOETZ, Intervenor-Appellant.	No. 80-7048

MOTION TO DISMISS APPEAL

Come now the United States and C. Howard Farr, Special Agent, Internal Revenue Service, appellees herein, by their counsel, and move to dismiss the appeal in the above-captioned case as moot, and in support thereof state as follows:

1. That the instant proceeding was instituted by the United States and Agent Farr to enforce an Internal Revenue summons seek-

ing production of certain records relating to the tax liability of Glenn G. Goetz;

2. That the District Court, on December 20, 1979, ordered the summons enforced, such enforcement to occur after January 15, 1980;

3. That Glenn G. Goetz filed a notice of appeal on January 15, 1980;

4. On or about January 15, 1980, Glenn G. Goetz filed in this Court a petition for a writ of mandamus to the District Court to order it to grant a stay pending appeal, or, in the alternative, for an order from this Court granting such a stay;

5. That this Court denied the petition on January 28, 1980;

6. That the respondents have now complied with the District Court's enforcement order by supplying the information demanded in the summons; and

7. That, because of the respondents' compliance with the District Court's order,

there is no controversy, the case is moot, and the appeal should be dismissed for mootness (United States v. Hanks, 565 F.2d 1344, 1350 (C.A.5, 1978); United States v. Carpenter, 425 F.2d 264 (C.A.5, 1970); Baldridge v. United States, 406 F.2d 526 (C.A.5, 1969); United States v. Deak-Perara International Banking Corp., 610 F.2d 89 (C.A.2, 1979); United States v. Olson, 604 F.2d 29, 31 (C.A.8, 1979); United States v. First National Bank of Sturgis, S.D., 587 F.2d 909, 910 (C.A.8, 1978); Barney v. United States, 568 F.2d 116 (C.A.8, 1978); Kurshan v. Riley, 484 F.2d 952 (C.A.4, 1973); United States v. Lyons, 442 F.2d 1144 (C.A. 1, 1971)).

WHEREFORE, it is respectfully requested that the appeal in the above-captioned case be dismissed as moot.

IN THE ALTERNATIVE, should this Court deny the motion to dismiss, it is respectfully requested that the time in which the

appellees may file and serve their brief be extended to thirty days from the date of the Court's order denying the motion.

M. CARR FERGUSON
Assistant Attorney General
Tax Division
Department of Justice
Washington, D.C. 20530
Counsel for the Petitioners-
Appellees

Dated: This 24th day of March 1980

APPENDIX "G"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, and C. HOWARD FARR, Special Agent, Internal Revenue Service, Petitioners-Appellees, v. CITIZENS & SOUTHERN BANK OF MILLEDGEVILLE, and its President, JERRY M. McREE, Respondents, and GLENN G. GOETZ, Intervenor-Appellant.	No. 80-7048

SUPPLEMENTARY BRIEF
on Order dated April 24, 1980

ISSUES

I.

Is there a "Law of the Circuit" on mootness of an Appeal in Bank Summons Enforcement Cases? -Which can be applied to Goetz in the instant Case?

II.

Can the Government carry its burden

moving for dismissal on "mootness" by the mere citation of distinguished Cases, lacking factual confirmation that they, in fact, apply to Goetz?

ARGUMENT

I.

Is there a "Law of the Circuit" on mootness of an Appeal in Bank Summons Enforcement Cases? - Which can be applied to Goetz in the instant Case?

The Order of this Court, dated April 24, 1980, directed a comparison of certain Fifth Circuit Cases respecting "mootness" with an eye to deciding if there is presently a "Law of the Circuit" in such cases and, by indirection, how do those cases apply to the instant case of Goetz - on appeal from a District Court Summons Enforcement Order?

The issue of intervention as of right by the Taxpayer has a critical bearing on the significance of Circuit Court decisions in Bank Summons Cases:

Prior to February 28, 1977, inter-

vention by Taxpayers in Bank Summons Cases was rare, the burden of establishing standing to intervene was enormous and the Court's discretion mitigating against taxpayer intervention was essentially unlimited.

With the passage of 26 U.S.C. 7609, intervention by the Taxpayer in 7602 Bank Summons Cases became a matter of right, universally recognized by the Courts based on Congress' mandate.[1/] The importance of the Cases was underscored by Congress which demanded Docket precedence by the language of

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1/ See 26 USC 7609(a) & (b),"Special procedures for third-party summonses," to wit:

"(a) Notice.-

"(1) In general.- If-

"(A) any summons described in subsection (c) is served on any person who is a third-party record-keeper, and ...

"(b) Right to intervene - right to stay compliance.-

"(1) Intervention.- Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7603. ..."

26 USC 7609(h)(2).[2/]

The Congress anticipated application of the Law to the District Courts and, on appeal, so, an analysis of this Circuit Court's Decisions both before and after February 28, 1977, is very much in order, since Bank Summons Cases appear to be expanding both in significance and in number.

First, look at the Fifth Circuit Decisions prior to February 28, 1977. Only two cases respecting "mootness" in I.R.S. Summons Cases appear:

Baldridge v. U. S., 406 F2d 526, decided January 16, 1969; and,

U. S. v. Carpenter, 425 F2d 264, decided April 21, 1970.

2/ 26 USC 7609(h)(2),"Jurisdiction of district court" reads as follows:

"(2) Except as to cases the court considers of greater importance, a proceeding brought for the enforcement of any summons, or a proceeding under this section, and appeals, take precedence on the docket over all cases and shall be assigned for hearing and decided at the earliest practicable date."

The Baldridge Opinion does not clearly set out whether the taxpayers Mr. and Mrs. Charles A. Reich were granted standing to intervene or not. The doubting Opinion of Circuit Judge Aldrich would intimate that Baldridge, the accountant, was effectively in possession of the Books and Records and it was he - not the Taxpayers - who delivered them into the hands of the I.R.S. on Order of the District Court.

There is nothing in the Opinion to indicate that the Taxpayers refused to deliver the Records themselves or demanded that Baldridge refuse to deliver the Records.

Because the Taxpayers effectively surrendered the Records themselves, they obviously waived their rights and mooted the appeal. Under the facts and circumstances, we could say that the Case establishes a partial law of the Circuit which could be stated, possibly, as follows:

"If the Third Party Recordkeeper

> delivers over records in response to I.R.S. Adminstrative Summons on Order of the District Court without record objection by the Taxpayer, then, an appeal of the District Court's Enforcement Order will be moot."
>
> "If the Appellants produced the Documents called for by the Summons and fully complied with the Order of the District Court", as the Baldridge Per Curiam Opinion says, "there is nothing on appeal for this Court to decide. The Case is moot."

Now, let us quickly distinguish Baldridge, supra, from the instant Goetz Case:

Goetz is the Appellant. It is not he who has complied with the Summons. He has timely raised factual objections by legal means in the District Court, maintained objection to Records' delivery according to law, both in the District Court and on Appeal. When the Congress recognized his standing as Respondent to protect those Records pursuant to 26 U.S.C. 7609 in the District Court of first instance, and on appeal by 26 U.S.C. 7609(h)[2]; then, it is and must be apparent that any surrender of

Records by the Third-Party Recordkeeper who is not an Appellant, cannot be used to moot the Appeal of Goetz, who is an Appellant. We can say, then, that according to any "Law of the Circuit" propounded by Baldridge, supra, the instant Case is distinguished, and, hence, not "moot".

Now, if we examine Carpenter, supra, we see that the taxpayers, James E. Little, Virgyl D. Johnson, R. E. McCrory and J. & C. Enterprises, Inc., did not enjoy standing to intervene in the District Court and, as a consequence, did not enjoy appeal as a matter of right. If they were not a Party in the District Court, their objection to delivery was useless. If Carpenter and C. C. W. Electronics were not a "third-party recordkeeper"[3/] as described by 26 U.S.C. 7609, then, the Records in question were not

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3/ 26 U.S.C. 7609, of course, did not apply at this time - but the principle applies to distinguish the facts.

Records of the "Taxpayers", James E. Little, et al, but Records of Carpenter and C. C. W. Electronics. If Carpenter and C. C. W. Electronics delivered over their own Records (of transactions directly with the Taxpayers) in compliance with the District Court Order, then, the Case was indeed moot.

The Law of the Circuit?

> "When the Respondent fully complies with the I.R.S. Summons for his own Records as a result of a District Court Enforecement Order, then, an appeal from the District Court Order is moot."

To distinguish Carpenter, supra, from Goetz instant, Carpenter surrendered his own Records which related to the Taxpayers, James E. Little, et al.

The Respondent Citizens & Southern Bank of Milledgeville, and its President, have delivered Third Party Records over Goetz' objections to the I.R.S. pursuant to Court Order. Because Goetz had recognized standing at the District Court level (pursuant to

26 U.S.C. 7609) to fully assert his objections to any Records' delivery as a matter of fact and law, then, it follows as a maxim, that his right of Appeal cannot be mooted by the actions of the Respondent Bank over whom Goetz has no power or control when they choose to surrender Records in compliance to Court Order, over the objections of Goetz.

The Law of the Circuit propounded in Carpenter does not apply to "third-party recordkeepers" as described in 26 U.S.C. 7609.

Both in Baldridge and Carpenter, compliance was full and the Cases were indeed "moot" because the Taxpayers had no standing at Law to contest or prevent the delivery of Records which were in the hands of the Respondent Parties to the District Court I.R.S. Summons Enforcement actions.

Now, what could be the "Law of the Circuit" growing out of Federal Trade Commis-

sion v. Gibson Products,569 F2d 900 (CA5 1978), decided March 17, 1978?

First, the application of the Case is a little difficult because it does not directly involve an I.R.S. Third-Party Recordkeeper Bank Summons District Court Enforcement Order.

It does relate, in principle, though, because the U. S. District Court was called upon to enforce an Administrative Agency (F.T.C.) Subpoena Duces Tecum.

During the pendency of the Appeal, the respondent, Gibson Products, provided the Documents demanded by the F.T.C. Subpoena and the Fifth Circuit was called upon to settle the issue of mootness on account of compliance. Judge Brown's Opinion reads as follows:

> The threshold question is whether this case is moot. Following the District Court's, as well as this Court's, denial of a stay pending appeal, a representative of Gibson provided the documents or summaries of the information as requested. Although Gibson has

> now substantially complied with these subpoenas and the FTC has indicated it will not pursue further proceedings, we believe the controversy is still alive. If this case were decided in Gibson's favor, relief would be available by an order requiring the FTC to return the subpoenaed documents and to forbid use of the material in the adjudicatory hearing. (at 903. Footnote references and cites omitted)

If we extrapolate the "Law of the Circuit" propounded in the FTC v. Gibson Products Case, supra, by application to Bank Summons Cases, it fairly could be stated as follows:

> "The Case is a live controversy and cannot be 'moot' if Appellant, with standing at Law, has raised substantial issues in the Court of first instance and on Appeal, which, if decided in his favor could merit relief by an Order of this Court requiring the Administrative Agency to return the Summoned Documents and forbid their use for Agency purposes."

Because the FTC v. Gibson Products Case was decided sometime after the February 28, 1977, effective date of 26 U.S.C. 7609 (which recognizes the Citizen-Taxpayer full standing Respondent status), we could deduce that compliance with the District Court's

Enforcement Order by any respondent, including a "third-party recordkeeper", would not ipso facto moot the case.

The burden of dismissal for "mootness", admittedly, lies on the Moving Party. If the Moving Party could establish to the satisfaction of this Circuit Court that:

1. Compliance was complete without objection by an appellant with legal standing in the original District Court action and on Appeal; or,

2. Compliance was complete over objection of an appellant with legal standing in District Court and on Appeal, but the Record clearly showed that appellant party had controverted no factual issues nor raised no points of undecided law, then he would have good cause to seek dismissal for mootness without examination of the case on its merits.

If the moving party could not carry the burden on either point, then, he is not en-

titled to dismissal for "mootness" and the Court of Appeals would be obligated to consider the case on its merits because "relief would be available by order requiring (the Administrative Agency) to return (Summoned) documents and to forbid use of (Summoned) material for (Administrative Agency purposes".[4/]

The time of the Court is valuable. If a case be truly moot, the merits must not be considered. Justice lies in forcing the moving party in "mootness" motions to bear his burden to establish that no substantial rights are involved, that no live controversy exists and that no examination on the merits could possibly result in relief for the appellant.

That burden was successfully borne in Baldridge and Carpenter where the taxpayer had no legal standing, no record of substantial legal rights involved nor factual con-

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4/ Loosely adapted from the Court's Opinion in FTC v. Gibson Products case.

troversy which would entitle him to relief, and no record of objection to the delivery of the Records.

The burden to dismiss for mootness cannot be borne in the instant Case of Goetz. The existing Law of the Circuit will not allow it.

The Court has also requested an analysis of Barney v. U.S., 568 F2d 116 (CA8 1978) as it might apply to the "Law of the Circuit" in principle, if not in binding force and effect.

The critical part of the Per Curiam Opinion lies in the following language:

> The Barneys intervened and asserted legal and philosophical arguments against the enforcement of the Summons and the imposition of Federal Income Taxes . . .
>
> The Court concluded that the Government had made the required prima facie showing and that the Barneys had not established any reason for the District Court's not ordering enforcement. The Court also considered and rejected the Barney's philosophical arguments.
>
> The Barneys admit the I.R.S. did obtain the Bank Records, but argue that the Government should not be able to

> deny them an appeal by obtaining their Records unlawfully and mooting the controversy. [underlining added]

If the Record reveals no factual showing in the District Court of bad faith or improper purpose by the I.R.S. by Barney, then, there actually was no live controversy once the Records were delivered. The Records were protected by force of law until Barney could appear and join a controversy. He failed to do so. He did not contest the Petition to Enforce the I.R.S. Summons by Affidavit, direct testimony or any other direct evidence. He merely cross-examined the I.R.S. Special Agent.

When we see by the language of the controlling Supreme Court case of U. S. v. LaSalle National Bank, 437 US 298 at 317, footnote 19 (continued at 318):

> The dispositive question . . . is whether the Service is pursuing the authorized purposes in good faith.

and at 316:

> The question whether an investiga-

> tion has solely criminal purposes must be answered only by an examination of the institutional posture of the I.R.S.

and at 315:

> While the Special Agent is an important actor in the process, his motivation is hardly dispositive.
> [underlining added]

We conclude that Barney had no competent evidence or witnesses to raise a live controversy there, he couldn't breathe any life into a dead horse by filing a Notice of Appeal.

If the Government were equipped to establish the mootness issue by fact and law to the satisfaction of the Court, elemental Justice demands they should have done so before the Briefs were ever filed in Barney's case as well as that of Goetz'.

When the U. S. Government deliberately fails and refuses to move for dismissal on mootness until the substantial arguments of the Appellant are neatly laid out for them in Brief, their action is unconscionable.

If the merits of the Case do not apply on account of mootness, then, they should not and cannot be presented or examined. The Government cannot have their cake and eat it too.

If the merits are examined on Appeal, then, the controversy is and must be live. It cannot be moot.

The Barney case does not conflict in any way with the present "Law of the Circuit". It must be strongly urged that the finding in the Barney case grants no carte blanche dismissal power to Agents of the Government in Third-Party Bank Summons cases.

The Barney case is distinguished from the instant Appellant Goetz', who, possessing legal standing in the District Court as Respondent-Intervenor, joined a live controversy by his Answer, Affidavit, Request for Admission, issuance of Subpoenas and an Offer of Proof, making a substantial showing of bad faith and improper purpose which con-

troversy is now, lawfully, on Appeal. That controversy cannot be mooted by the actions of the Respondent Bank, who, over the objections of Goetz, has surrendered the Records in question.

The "Law of the Circuit" is and must be that a "third-party recordkeeper" Respondent Bank can deliver over records and, thereby, moot the case as to it by compliance, but it cannot moot the case as to other respondents such as Intervenor Goetz who has joined a live controversy in the District Court and pursued his substantial position on Appeal.

II.

Can the Government carry its burden moving for dismissal on "mootness" by the mere citation of distinguished Cases, lacking factual confirmation that they, in fact, apply to Goetz?

The Government's citation of the following Cases has been nullified by previous argument that they are distinguished from Goetz':

U.S. v. Carpenter, supra;

U. S. V. Baldridge, supra; and,

Barney v. U.S., supra.

The thrust of F.T.C. v. Gibson, supra, is overwhelmingly favorable to Goetz as it applies to the principle of mootness.

What of other Circuit Cases which the Government Lawyers cite such as:

U.S. v. Lyons, 442 F2d 1144 (CA1 1971) and Kurshan v. Riley, 484 F2d 952 (CA4 1973), which both came down before the enactment of 26 U.S.C. 7609 by Congress?

Lyons is distinguished because there, the Taxpayer himself, unlike Goetz, surrendered the Records pursuant to Court Order.

Riley, supra, is distinguished because it relates to injunctive proceedings and not directly to Summons Enforcement proceedings arising under 26 U.S.C. 7602, 7604 as does Goetz' case. The rule of "mootness" as to injunctive relief is radically different than on appeals from Statutory actions.

Recently, the case of U.S. v. Deak-Perera International Banking Corp. (and

Charles V. Stephenson, Intervenor-Appellant), 610 F2d 89 (CA2 1979) has been used to buttress the I.R.S. "mootness" claim. Actually, the Respondent-Intervenor in the Deak Case did not appear at the Enforcement Hearing set for the cause, did not submit any controverting Affidavits, testimony or evidence to overcome the prima facie case established by Petition and in open court by the Government. Such a dismissal for "mootness" in Deak is a far, far cry from dismissal in Goetz who joined a legal controversy in District Court and appeared to pursue it, but was deprived by the District Court of every available lawful means to do so.

The fatal fly in the Government's ointment is this: The facts in Goetz do not fit the "mootness" frame for the picture that the Government's cited Cases paint.

Goetz' case is not "moot". He may not prevail in any or all particulars, but stand or fall, it must be on the merits - not the

"mootness" of his Case.

Respectfully submitted

s/ Glenn G. Goetz

Glenn G. Goetz

APPENDIX "H"

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

August 23, 1979

Mr. Glenn Goetz
Route 1
Gordon, Georgia 31031

Re: Glen G. Goetz v. United States
A-151

Dear Mr. Goetz:

Your application for stay in the above-entitled case has been presented to Mr. Justice Powell, who has endorsed thereon the following:

"Denied
8/22/79
LFP"

Returned is your money order for $100 as there is no filing fee for applications.

Very truly yours,
MICHAEL RODAK, JR.,
Clerk

By
s/ Patricia A. Dean
Patricia A. Dean
Assistant Clerk

th
Enc.

cc: Hon. Wade H. McCree, Jr.
Solicitor General of the United States

APPENDIX "J"

U.S. Department of Justice

January 13, 1981

Washington, D.C. 20530

MCF:SFK:FDFriedman:klm
5-19M-932
8121258

Mr. Glenn G. Getz
Route 1, Box 608
Gordon, Georgia 31031

Re: Glenn G. Getz
Gordon, Georgia

Dear Mr. Getz:

Receipt is acknowledged of your letter dated December 1, 1980, requesting information on the status of your case and asking for certain particulars of the evidence against you.

Please be advised that the Internal Revenue Service has referred your case to this office with the recommendation that you be prosecuted for willful failure to file individual income tax returns for the years 1977 and 1978 in violation of I.R.C. Section 7203. If you so desire, you or your attorney will be granted a conference in regard to this matter at the Department of Justice in Washington, D.C. At that conference, you or your attorney can present all arguments and documentary material which you wish the Government to consider. Whether or not you request a conference, this office will notify you in due course of any further change in the status of your case.

Sincerely yours,

M. CARR FERGUSON
Assistant Attorney General
Tax Division

By: s/ [illegible]
STANLEY F. KRYSA
Chief, Criminal Section

U.S. Department of Justice

Tax Division

February 11, 1981

Washington, D.C. 20530

JFM:SFK:FDFriedman:klm
5-19M-932
8121258

Mr. Glenn G. Getz
Route 1, Box 608
Gordon, Georgia 31031

Re: Glenn G. Getz
Gordon, GA

Dear Mr. Getz:

This is to advise you that the above-captioned case has been transmitted to the United States Attorney for the Middle District of Georgia.

Sincerely yours,

JOHN F. MURRAY
Acting Assistant Attorney General
Tax Division

By: s/Stanley F. Krysa
STANLEY F. KRYSA
Chief, Criminal Section

cc: Denver L. Rampey, Esq.
United States Attorney
Macon, Georgia